



May 19, 2021

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: *Public Comment in Docket ED-2021-OESE-0033, Proposed Priorities—American History and Civics Education*

Dear Secretary Cardona:

The State of Texas, America First Policy Institute¹ (“AFPI”), and the Texas Public Policy Foundation² (“TPPF”) submit this comment on the priorities proposed by the U.S. Department of Education on April 19, 2021, under the title *Proposed Priorities—American History and Civics Education*, 86 Fed. Reg. 20348. Because the proposed priorities are unlawful, foster racism and factionalism, promote misinformation of students, and undermine civic unity, we urge that you decline to adopt the proposed priorities and withdraw the proposal, or alternatively adopt proposed priorities that promote civics education that nourishes the growth of an informed citizenry united around our common commitment to the most American of all propositions, “that all men are created equal.”

I. The Proposed Priorities Violate Their Authorizing Statute.

In adopting priorities, the Department does not write on a blank slate; rather, its purpose must be to implement faithfully the statutory direction given by Congress. Here, the Proposed Priorities do not simply fail to follow congressional direction but affirmatively undermine the objective assigned to the Department by the people’s representatives.

The Proposed Priorities claim as their statutory authority 20 U.S.C. 6662 and 6663. Those sections authorize two types of grants. Section 6662 authorizes grants “[f]rom the amounts reserved under section 6661(b)(1) of this title”³ to fund Presidential Academies (for teachers) and Congressional Academies (for students). Section 6663 authorizes grants “[f]rom the amounts reserved by the Secretary under section 6661(b)(2) of this title”⁴ to fund the development of new teaching methods and teacher professional development programs. Section 6661, in turn, authorizes the Department “to carry out an American history and civics education program.”⁵ The first question, then, is whether section 6661 has anything to say about the objectives and methods of this American history and civics education program, under the umbrella of which sections 6662 and 6663 operate.

As it turns out, section 6661 has quite a bit to say. That section specifies that the program is “to improve—

- 1) *The quality of American history, civics, and government education by educating students about the history and principles of the Constitution of the United States, including the Bill of Rights; and*
- 2) *The quality of the teaching of American history, civics, and government in elementary schools and secondary schools, including the teaching of traditional American history.”*⁶

Congress, then, drew a distinction between the services the program may fund for students and those it may fund for teachers, and specified its objectives for each. We will consider the former first.

The Department is authorized under the program to fund only a particular sort of education for students: education “about the history and principles of the Constitution of the United States, including the Bill of Rights.” Both the word “history” and the word “principles” are modified by the prepositional phrase “of the Constitution of the United States.” Therefore, programmatic grants may fund student education about one topic, and one topic only: the American Constitution, with

1 AFPI is a 501(c)(3) nonprofit, non-partisan research institute dedicated to promoting and defending liberty, free enterprise, and national greatness.

2 TPPF is a 501(c)(3) nonprofit, non-partisan research institute dedicated to promoting and defending liberty, personal responsibility, and free enterprise.

3 20 U.S.C. 6662(a).

4 20 U.S.C. 6663(b).

5 20 U.S.C. 6661(a).

6 *Id.*

respect both to its content and underlying philosophy, including the regime it creates (its “principles”) and its existence in time (its “history”). Programmatic grants may not be used to teach about other topics in American history or civics.

How do the Proposed Priorities educate “about the history and principles of the Constitution of the United States”? They do not. Indeed, the word “Constitution” appears in the Proposed Priorities precisely once, in an (unattributed) quotation to section 6661 that is then left to languish without discussion. *See* 86 Fed. Reg. at 20349. The first Proposed Priority is intended to fund teaching that “validate[s] and reflect[s] the diversity, identities, histories, contributions, and experiences of all students.” *Id.* at 20349. The grants funded under this Proposed Priority, then, will educate about the students and their characteristics, not about the Constitution. Likewise, the second Priority would fund teaching about “critical thinking,” including “evaluating sources and evidence” and “[u]nderstanding ... biases.” *Id.* at 20350. Again, nothing about the Constitution to be seen.

Turning to the services that may be funded for teachers, we see that they must improve “the quality of the teaching of American history, civics, and government in elementary schools and secondary schools, including the teaching of traditional American history.”⁷ This provision differs from the provision specifying the objective of student education in that it requires only that the education provided to teachers “*includ[e]* the teaching of traditional American history” (emphasis added). The statute thus leaves open the possibility that teachers may be assisted to develop excellence in teaching some topics other than traditional American history. The statute is clear, though, that the program must pursue excellence in teaching “traditional American history” as at least one topic area.

The Proposed Priorities fail to pursue that objective. That is because the history that the Proposed Priorities intend to assist teachers to teach is precisely the opposite of “traditional American history.” The Department itself holds out the 1619 Project as exemplary of the sort of teaching the Priorities promote. 86 Fed. Reg. at 20349. The first paragraph on the 1619 Project’s homepage declares that “it is finally time to tell our story truthfully,” and explains that the project’s “aim [is] to reframe the country’s history.”⁸ This sort of reimagined history is the target of the Proposed Priorities, which will focus on “systemic marginalization [and] biases ... in American history,” as well as “uncovering and recognizing bias in primary ... sources.” 86 Fed. Reg. at 20349-50. We have no love for the 1619 Project, which is deeply flawed, but surely even its supporters would admit that the project (and any history teaching modeled after it) does not constitute “traditional American history.”

The education offered to teachers under the Proposed Priorities is problematic, then, in two ways. First, the Priorities fund education for teachers that does not equip them to teach, among other things, “traditional American history,” as section 6661 requires. The teaching that the Principles will promote will not be “teaching ... including the teaching of traditional American history.”

Second, insofar as the teaching fostered by the Proposed Priorities comes to be common throughout the United States, it will displace the teaching of “traditional American history,” because the central thrust of the 1619 Project and related educational enterprises is that American history as it has traditionally been taught is fundamentally wrong. The education the Priorities have in mind thus differs from, say, the teaching of statistical methods, which is not “traditional American history” but is compatible with it. Because the Proposed Priorities will, to the extent they achieve their objectives, cause to cease the teaching of the one sort of history Congress expressly intended to promote, the Priorities would be arbitrary and capricious if adopted, because they would undermine one of Congress’s specified objectives in enacting the statute.

II. The Proposed Priorities Would Permit and Foster Applications That Violate Title VI of the Civil Rights Act.

Title VI of the Civil Rights Act provides as follows:

*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*⁹

The Proposed Priorities apply only to “activit[ies] receiving Federal financial assistance.” Therefore, recipients of funds under the Priorities have an obligation not to “subject[] to discrimination” either students or teachers who receive education in their programs, and the Department has an obligation to ensure that the Priorities do not bring about such discrimination.

⁷ 20 U.S.C. 6661(a)(2).

⁸ “The 1619 Project,” *New York Times Magazine* online, accessed May 13, 2021, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>.

⁹ 42 U.S.C. 2000d.

The Department itself tells us what discrimination under Title VI means: to discriminate is, *inter alia*, to “[s]ubject an individual to ... separate treatment in any matter related to his receipt of any service,” as well as to “afford [an individual] an opportunity” to “participate in [a funded] program” which “is different from that afforded to others under the program,” on account of race, color, or national origin.¹⁰

The Proposed Priorities would, as formulated, permit and even foster the funding of discriminatory projects in contravention of Title VI. To address the first Priority, an applicant must, e.g., “incorporate[] teaching and learning practices that ... [t]ake into account systemic marginalization, biases, inequities, and discriminatory policy and practice in American history.” 86 Fed. Reg. at 20349. While “systemic marginalization [and] biases” are not defined in the Priorities, we can gain some idea of what they are by looking to the materials (held out as exemplary in the Proposed Priorities, *id.*) provided by the Smithsonian’s National Museum of African American History and Culture. Those materials inform us that “no one is colorblind to race”;¹¹ that white people “must ... work to change their internalized racism,” lest they “(un)consciously uphold aspects of white supremacy, white-dominant culture, and unequal institutions and society”;¹² and that “[w]hiteness (and its accepted normality) ... exist as everyday microaggressions toward people of color.”¹³

Drawing on the examples given by the Proposed Priorities, then, “teaching and learning practices that ... [t]ake into account systemic marginalization [and] biases” appears to mean practices that convey to students that some people (those who are white) hold certain ideas and engage in certain practices simply because of their race (or at least tend to hold these ideas and engage in these practices absent strenuous efforts to the contrary) while other people (those who are people of color) do not hold these ideas and engage in these practices simply because of their race. Such instruction necessarily subjects program participants to “separate treatment” on account of race, as well as “afford[s] ... an opportunity” to “participate in [a funded] program” which “is different from that afforded to others under the program” on account of race.¹⁴ That is because program participants who are white are told that they hold racist ideas and engage in racist conduct simply because of their race, whereas people of color who participate in the program are not told this about themselves. The result is that for white participants, participation in the program may be accompanied by “feelings of guilt, sadness, confusion, defensiveness, or fear” that are not prompted for people of color who participate.¹⁵

This is exactly the sort of differential treatment in federally assisted programs that Title VI of the Civil Rights Act was meant to abolish. Because the Proposed Priorities, as currently articulated, would permit and even foster programs that treat some participants differently than others based solely on their race, finalizing the Priorities would be unlawful, arbitrary, and capricious.

III. The Proposed Priorities Would Misinform Students About American History and Exacerbate Civic Divisions.

In specifying the education that students should receive under the American Civics and Education program, Congress selected the “history and principles of the Constitution of the United States, including the Bill of Rights,” for a reason. The Constitution creates the American regime, and the regime is the form of the city; the Constitution, then, makes America to be what it is. It makes us who we are as a people. St. Augustine famously remarked that a people is defined by what they love in common.¹⁶ In America, we come from all countries and ethnic backgrounds; we follow different occupations; we have a bewildering array of traditions; we enjoy various pastimes; we differ in how and whether we worship God. What we have in common is the Constitution; if we are to be a single people, it will be out of love for the Constitution and the principles on which it stands.

Those principles are what make America unique. America is not the first republic, or the first country in which the people rule, or the first regime in which laws govern rather than men. The American innovation was to recognize the sovereignty of the people while effectively dividing and limiting the exercise of sovereignty. The result was that ordinary people could rule themselves, alone and in the various communities—states, towns, churches, professional and charitable associations—that they form. The American Constitution leaves to these ordinary people, acting alone or together, the most important

¹⁰ 34 C.F.R. 100.3(b)(iii) and (v).

¹¹ “Talking about Race: Race and Racial Identity,” the Smithsonian’s National Museum of African American History and Culture, accessed May 18, 2021, <https://nmaahc.si.edu/learn/talking-about-race/topics/race-and-racial-identity>.

¹² “Talking about Race: Being Antiracist,” the Smithsonian’s National Museum of African American History and Culture, accessed May 18, 2021, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist>.

¹³ “Talking about Race: Whiteness,” the Smithsonian’s National Museum of African American History and Culture, accessed May 18, 2021, <https://nmaahc.si.edu/learn/talking-about-race/topics/whiteness>.

¹⁴ 34 C.F.R. 100.3(b)(iii) and (v).

¹⁵ “Talking about Race: Whiteness.”

¹⁶ Augustine of Hippo, *The City of God*, bk. 19, ch. 24. President Biden quoted this passage from St. Augustine in his inaugural address.

things in life: where to live and work; how to preserve justice and protect the environment; how to raise and educate a family; whether, whom, and how to worship. And, of course, it leaves to them the electing of the magistrates who will govern in those matters over which they have been given authority.

The regime our Constitution creates is rational only if these ordinary Americans have what the classical world believed the great or the leisured classes alone had at their disposal: the wisdom to make right decisions in the most important matters. That is to say, the American experiment depends on the proposition that humans *qua* humans are endowed with reason. While we differ in wealth, education, family connections, and physical abilities, we are alike in this: that with respect to having human reason, all men are created equal.


This proposition is the vital principle of our national life, but as is the way with all living things, it took time for our Nation to grow into what it was meant to be. The horrific crimes committed against enslaved Americans were the grossest betrayal of that principle; the sacrifices of Union soldiers, its greatest vindication. That principle was further enshrined and clarified in the Fourteenth Amendment's Equal Protection Clause. *Brown v. Board* and other judicial decisions striking down segregationist laws; the Civil Rights Act of 1964; and the Civil Rights Movement are all workings out of the great proposition at the heart of our Constitution. And as we continue to battle racism wherever it may be found, it is under the aegis and direction of this principle.

Most fundamentally, our concern with the Proposed Priorities is that under them children will be taught that our Constitution—and the country it has built—is racist. For the reasons we have given, nothing could be further from the truth. Such a lie would do our students and our Nation a grave disservice: it would take away the ground of unity in our civic life. And by encouraging program participants to see in each person the product of racial, cultural, and societal influences, rather than first and foremost a human being sharing in the gift of reason and therefore capable of self-government and fellow citizenship, it would irreparably harm our students, as well.

Conclusion

For the foregoing reasons, Texas, AFPI, and TPPF urge you to decline to adopt the Proposed Priorities and to withdraw the proposal. Alternatively, we urge you to adopt a modified version of the Priorities that brings them into conformity with governing law and with the foregoing principles. Such an amended version would necessarily offer to students only teaching about the Constitution's principles and history, and it would ensure that all programming acknowledges the pivotal role played by the Constitution in guiding our Nation toward a more just form of society in which the humanity of every man, woman, and child is revered.

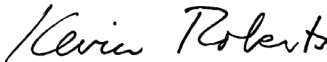

Sincerely,


Ken Paxton
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